No. 87-1977

Supreme Court, U.S.
FILED
JUN 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

_____ Term, 1988

MARINE BANK OF SPRINGFIELD,
as Special Administrator of the
Estate of PATRICIA WELLER, Deceased,
Plaintiff-Appellant

vs.

THOMAS HENDRICKSON, SANGAMON COUNTY, ILLINOIS, DAMON BARLEY, JOHN GREENAN, II, HARLAND SANDERS, SCOTT ALLIN, CITY OF SPRINGFIELD, ILLINOIS,
Defendant-Appellees.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1) Whether federal courts can create decisional law which conflicts with substantive state law in a tort action based on diversity of citizenship.

2) Whether granting summary judgment where a substantial dispute exists without hearing denies the right of civil trial by jury guaranteed under the Seventh Amendment to the United States Constitution.

TABLE OF CONTENTS

APPENDIX

Page

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

REASONS FOR GRANTING THE WRIT

CASES

OTHER AUTHORITIES

No. _____

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PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MARINE BANK OF SPRINGFIELD, as Special Administrator of the Estate of PATRICIA WELLER, Deceased, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on March 21, 1988, to resolve the issue of the applicability of federal decisional law to tort

liability of local police agencies in diversity actions and whether the decision of the federal district court in granting the Defendants' motion for summary judgment without hearing denies the Plaintiff the constitutionally protected right of civil trial by jury.

OPINION BELOW

The judgment at issue is an unreported order adopting, *in toto*, a district court opinion reported at 655 F.Supp 853. The order of the Court of Appeals and the published opinion of the District Court are reproduced in the appendix hereto.

JURISDICTION

The decision of the Seventh Circuit Court of Appeals was issued on March 21, 1988. A timely Petition for Rehearing *en banc* was filed on April 4, 1988. Petition for Rehearing was denied on April 18, 1988. A stay of mandate to allow the filing of this Petition for Certiorari was granted until June 6, 1988. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS

Ill.Rev.Stat., Ch. 85, §4-102
Ill.Rev.Stat., Ch. 95 1/2, §11-205
IPI 2d (1961), No. 10.01
IPI 2d (1961), No. 60.01
Springfield Police Department General Order #30
Sangamon County Sheriff's Department, Department Rules and Regulations, R.72, No. 11.11, 11.12

(All of the foregoing are set forth in the Appendix to this brief.)

STATEMENT OF THE CASE

Federal jurisdiction for the underlying action is based upon diversity of citizenship under 28 U.S.C.A. §1332.

The action is brought by the Marine Bank of Springfield (now known as Springfield Marine Bank), as special administrator of the Estate of PATRICIA WELLER, deceased, against Sangamon County, Illinois, City of Springfield, Illinois, and individual police officers employed either by the Sangamon County Sheriff's office or the Springfield Police Department.

On May 8, 1982, based upon a telephone report, Wayne Mudd was suspected of stealing a tire. (Police transcript, record 72, Plaintiff's Exhibit 2) When initially observed by the police, Mudd was on foot, unarmed and alone in a used car lot. The officer did not observe Mudd commit any criminal act. (Deposition of John Greenan, record 75, Plaintiff's Exhibit 8I, pages 11-13.) When confronted, Mudd ran to his vehicle and began to drive away at a high rate of speed and the officer initiated pursuit. (Deposition of John Greenan, record 75, Plaintiff's Exhibit 8I, pages 10-11.)

In addition to a physical description obtained by the original investigating officer, the police observed the license number of Mudd's vehicle and communicated that information by radio to the dispatcher and the other officers engaged in and monitoring the pursuit. (Deposition of John Greenan, record 75, Plaintiff's Exhibit 8I, page 26.)

Despite the fact that Mudd did not exhibit any dangerous conduct prior to the pursuit, the police continued to pursue Mudd at high rates of speed over 9 miles through the corporate limits of the City of Springfield. The original Springfield police pursuit car went out of control, hit a curb and it was reported disabled to the dispatcher. Mudd continued to run stop signs, red lights, and ultimately collided with Plaintiff's decedent, Patricia Weller.

Patricia Weller was a single parent supporting two

young sons who rose early that Saturday morning to drive to a nearby laundromat. Patricia Weller, a totally innocent bystander, remained in a coma for several years before her death. Her children became charges of the state of Illinois and later the states of California and Washington. Mudd was successfully prosecuted for reckless homicide and he remains in the custody of the State of Illinois. *People v. Mudd,* 154 Ill.App.3d 808, 507 N.E.2d 869, 107 Ill.Dec. 716 (4th Dist. 1987).

Kenneth Katsaris, a law enforcement expert the trial judge recognized as having " . . . qualifications to lengthy too mention . . . ", testified in his deposition that the Defendants were negligent in participating in a high risk pursuit of Mudd after a physical description and vehicle identification was obtained. (Deposition of Kenneth Katsaris, record 74, Plaintiff's exhibit 8A, pages 98-115.) The Defendants presented experts who gave depositions that they believed that the officers acted reasonably.

On February 26, 1987, the court granted the motions for summary judgment of all the Defendants without hearing, pursuant to an Opinion Order of that date.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT COURT OF APPEAL'S ADOPTION OF THE TRIAL COURT'S OPINION VIOLATES THE DOCTRINE OF *ERIE v. TOMPKINS*, 304 U.S. (1938).

Introductory Argument

The trial court misstated the issue raised by the Defendants' Motions for Summary Judgment.

> Reduced to a minimum, Plaintiff claims that pursuing a criminal through city streets on the suspicion of simple theft is negligence *per se* where the police officer possesses a description of the culprit

> and the vehicle's license number. Such an assertion, however, is not-nor should it be-the law in Illinois.
>
> *Armstrong v. Mudd*, 655 F.Supp. 853, 858 (C.D. Ill. 1987)

Pursuit of a theft suspect under the facts of this case need not be negligence *per se* under Illinois law to present a question of fact for a jury. In opposing a motion for summary judgment, the Plaintiff only needed to show that continuation of high risk pursuit under the facts of this case created an issue of fact for jury determination. However, the trial court refused to call Defendants' motions for hearing, but instead used its own misstatement of the Plaintiff's position to peremptorily conclude this case without a hearing.

The trial court published an opinion based largely upon a broad policy statement expressed in another published opinion by a federal district court. *State v. Fidelity & Casualty Co.*, 263 F.Supp. 88, 90-91 (S.D.W.Va.1967). The trial court ruled that since initiating a high risk pursuit is not negligence *per se*, a jury can never find negligence, *as a matter of law*. This is a classic *non-sequitur*. Nevertheless, the trial court's published opinion was adopted, *in toto*, by the Seventh Circuit Court of Appeals.

This result ignores controlling precedent of the Illinois Supreme Court and intermediate appellate courts. The district court opinion adopted by the Seventh Circuit carves out an exception to the Illinois common law and statutory duty of reasonable care imposed upon its police officers.

A. The law of Illinois requires reasonable care by its police officers.

The evidence submitted to the trial court created a question for the jury on the issue of whether the Defendants negligently engaged in a high risk pursuit of a person suspected of simple theft. The trial court was bound to examine this case under Illinois law. *Erie v. Tompkins*,

304 U.S. 64 (1938)

At the outset of its opinion the trial court pays lip service to the *Erie doctrine* (1938). However, the opinion itself departs from Illinois law in an effort to immunize police officers from the foreseeable result of their questionable conduct. In Illinois, the decision to pursue a suspect at high speed is a discretionary police function requiring the exercise of reasonable care under both statutory and common law. *Ill.Rev.Stat.*, Ch. 95 1/2, §11-205. *Moore v. Cook*, 22 Ill.App.2d 48, 159 N.E.2d 496 (4th Dist. 1959); *Sundin v. Hughes*, 107 Ill.App.2d 195, 246 N.E.2d 100 (1st Dist. 1969) There is no statutory mandate compelling an officer to chase down every "suspect" at all costs. In fact, the Illinois statutes support the exercise of restraint in law enforcement by immunizing police officers and agencies from *any* liability based upon the "failure to identify or apprehend criminals." *Ill.Rev.Stat.*, Ch. 85, §4-102

B. A genuine issue of disputed fact exists in all high speed police chases.

The facts in this case are not unique. High speed police chases and the resultant carnage caused to innocent bystanders is a problem recognized by responsible police agencies and has been discussed in police publications and professional studies for the past twenty years.

> For example, more than ten years ago, the Physicians for Automotive Safety estimated that more than 500 persons were killed annually in pursuit-related crashes throughout the United States. At about the same time, the Center for the Environment and Man, Inc., a study funded by the U.S. Department of Transportation, estimated that 300-400 pursuit-related fatalities occurred annually, that between 2,500-5,000 pursuit-related injuries occurred annually, and that between 250,000-500,000 pursuits occur annually in the United States.
>
> (*Law & Order*, Vol. 33, No. 7, July 1985, p. 15)

The trial court's published opinion, adopted by the Seventh Circuit, gives an absolute license to police agencies to engage in high speed chases *in all cases*. It is a judicial paraphrase of a recent controversial California study, rejected even by the Defendants' expert on police procedures.

> Q. All right. Go ahead and tell me what the results of that study were and the conclusions they reached?
>
> A. They studied six months, 683 pursuits if I remember correctly, and they looked at an incredible number of pre-chase and post-chase variables and came to the conclusion – it's not their words, but I'm going to interpret it, that it's worth chasing everyone so that the deterrent effect of law enforcement is to be seen in the community.
>
> They worded it much better than I can at this point. But people are going to get injured and people are going to get killed *and that's the price we have to pay for protected law enforcement.*
>
> Q. Do you agree with the conclusions reached?
>
> A. Not totally, no, sir.
>
> Q. Explain to me the exceptions that you take or the differences that you, based on your experience and expertise, have with the conclusions that were reached in the California study?
>
> A. They appear to be willing to get involved with high risk chases that endanger property and life to a greater degree than I would.
>
> (Deposition of Geoffrey Alpert, R.74, Plaintiff's Exhibit 8b, pp. 40-41, emphasis added)

High speed police chases are not warranted *in all cases*, nor is it universally recognized by society as " . . . the price we have to pay for protected law enforcement." The high price Illinois citizens pay to support this type of irresponsible police conduct is borne by an innocent public, rather than the police agencies creating the risk. The soci-

etal and economic costs are enormous. Illinois has determined that irresponsible police conduct must be deterred rather than condoned. Federal judicial activism which ignores a legitimate state interest in requiring reasonable conduct by Illinois police agencies flies in the face of the *Erie* doctrine.

Reasonable care is a question of fact to be determined by a jury, not legally defined by a judge. This is evident from the Illinois Pattern Jury Instructions.

> When I use the words "ordinary care", I mean the care a reasonable careful person would use under circumstances similar to those shown by the evidence. *The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.*
>
> I.P.I. Instruction No. 10.02 (emphasis added)

As recently observed by this court, it is not the function of a federal judge to determine the proper inference to be drawn from evidentiary facts, nor to ignore the testimony of law enforcement authorities.

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, *whether he is ruling on a motion for summary judgment* or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Adickes*, 398 U.S., at 158-159, 90 S.Ct., at 1608-1609.
>
> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (emphasis added)

Some federal district courts have expressed a willingness to adhere to this Court's rule that summary judgment must not be used to circumvent the Seventh Amendment.

> . . . Summary judgment should be "cautiously invoked" so that no person will be improperly deprived of his Seventh Amendment right to a jury

> trial where there is no genuine issue as to any material fact. *Cf. Inland Oil & Transport Co. v. U.S.*, 600 F.2d 725 (8th Cir. 1979), *cert. denied*, 444 U.S. 991, 100 S.Ct. 522, 62 L.Ed.2d 420 (1980).
>
> *Robertson v. White*, 635 F.Supp. 851, 870 (W.D.Ark. 1986)

The *Inland Oil* case relied upon by the Arkansas district court's published opinion was based upon earlier expressions of this Court's warning against the abuse of summary judgment.

> . . . We recognize at the outset that summary judgment is an extreme remedy which may not be granted unless the movant has established his right to the judgment beyond controversy and that summary judgment is not appropriate where material facts remain in dispute. Moreover, in ruling on a motion for summary judgment, the district court must view the facts in the light most favorable to the party opposing the motion and give that party the benefit of all reasonable inferences to be drawn from the evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153-59, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).
>
> *Inland Oil & Transport Co. v. U.S.*, 600 F.2d 725, 727 (8th Cir. 1979)

The trial court's summary disposition of the substantial claims of an innocent bystander is a signal to Illinois police agencies that the economic consequences of ill-considered police chases will not be allocated among those that participate in the misadventure, but will instead be borne by its innocent victims. Instead of being deterred by the scrutiny of fellow citizens they are sworn to protect, Illinois police officers are granted unquestioned discretion by a federal court to determine whether a high speed chase should be initiated and the circumstances under which it should be continued. This unlimited license does not require a weighing of the relative risk to life and property of others and ignores state law. If police agencies are not

held responsible for their conduct under state law, they will continue to act irresponsibly.

> . . . if the incentive to take care is reduced because the scope of liability is reduced, people will be less careful, and the infrequent but cumulatively significant result will be more fatal accidents. A recent survey of the empirical literature relating to the effects of tort law on automobile accidents contains additional evidence that tort law leads to lower accident rates.
>
> by W.M. Landes and R.A. Posner, *The Economic Structure of Tort Law*, p. 11 Harvard University Press (1987).

C. Law enforcement authorities disagree as to when high risk police chases are warranted.

The consensus of opinion in the law enforcement community does not support a duty to engage in high speed pursuits *in all cases*. All of the experts retained by the Defendants in this case acknowledged that the need to capture a suspect had to be carefully weighed against the danger to the public inherent in a high speed pursuit. Police agency commentators analogize a high speed chase to Russian Roulette.

> A situation similar to this occurs hundreds, if not thousands, of times somewhere in the United States on a daily basis. Unfortunately virtually every time it occurs the police officer is playing "Russian Roulette" with the lives of innocent citizens.
>
> Considering that officers are supposed to be protecting the lives and property of innocent citizens, it is indeed paradoxical that in the performance of their duties they should place lives and property in jeopardy.
>
> (*Law & Order*, Vol. 33, No. 7, July, 1985, p. 15)

The employment of high risk pursuits *in all cases* is a controversial minority view, even among police agencies.

Whether the police acted reasonably in initiating a high speed vehicular chase through populated city streets is not a factual issue that can be disposed of summarily by a single federal judge.

The great weight of contemporary authority holds that high risk police chases are only justified *in those few cases* where police officers reasonably believe immediate apprehension is necessary to prevent further risk to the public. The facts of each case require a weighing of such risks. The police agencies refused to weigh those risks in this case. The trial court also refused to weigh those risks before denying the Plaintiff a right to a jury trial and the Seventh Circuit has embraced the trial court's opinion as its own. This is not the law of Illinois.

D. Negligence and Proximate Cause Under Illinois Law

The trial court acknowledged that the police "caused" a high speed chase, yet held that the police agency had no responsibility for the foreseeable result of their actions. The rationale for this conclusion was because, under *Indiana law*, "police cannot be made insurers." The trial court again ignored Illinois law to search out obscure authority from foreign jurisdictions.

> . . . *Undoubtedly the officers' actions caused Mudd to drive recklessly.* Still, the conclusion that the patrolmen are responsible for the results of the criminal's behavior does not follow. "Police can not be made *insurers* of the conduct of the culprits they chase." *Bailey v. L.W. Edison Charitable Foundation*, 152 Ind.App. 460, 468, 284 N.E.2d 141, 146 (3d Dist. 1972).
>
> *Armstrong v. Mudd*, 655 F.Supp. 853, 859 (C.D.Ill. 1987) (emphasis added)

The trial court also found solace in one Illinois appellate court decision dealing with a directed verdict where the injured party was a willing participant in an attempt to escape the police, rather than an innocent bystander.

From that case the trial court seized upon a single quote. "The officers' conduct was reasonably foreseeable. As such, their conduct could not be the proximate cause of the accident. *Id.* at 1080-81, 99 Ill.Dec. at 19-20, 495 N.E.2d at 84-85." *Armstrong v. Mudd*, 655 F.Supp. 853, 860 (C.D.Ill. 1987).

This is also a classic *non sequitur*. "Foreseeable" conduct by police officers certainly does not negate proof of causation. The Illinois Rule is: if the officers' conduct produces foreseeable injury, the issue of causation must be submitted to the jury. The trial court disposed of the important appellate case of *Brooks v. Lundeen*, 49 Ill.App.3d 1, 364 N.E.2d 423 (2nd Dist. 1977) in a footnote, and completely ignored the controlling decision of the Illinois Supreme Court. *Ney v. Yellow Cab Co.*, 2 Ill.2d 74, 117 N.E.2d 74 (1954).

The preeminent case in Illinois on the issue of when negligence and proximate cause are jury questions in cases involving a fleeing criminal is *Ney*. The Illinois Supreme Court's opinion in *Ney* mandated that questions of reasonable care and proximate cause be determined by a jury where reasonable men could differ as to a result.

> Questions of negligence, due care and proximate cause are ordinarily questions of fact for a jury to decide. The right of trial by jury is recognized in the Magna Charta [sic], our Declaration of Independence and both our State and Federal constitutions. It is a fundamental right in our democratic judicial system. Questions which are composed of such qualities sufficient to cause reasonable men to arrive at different results should never be determined as matters of law. The debatable quality of issues such as negligence and proximate cause, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness and necessity of leaving such questions to a fact-finding body. The jury is the tribunal under our legal system to decide that type of issue. To with-

> draw such questions from the jury is to usurp its function (citation omitted).
>
> *Ney v. Yellow Cab Co.*, 2 Ill.2d 74, 84, 117 N.E.2d 74 (1954).

In *Ney*, the Defendant left his cab unattended and it was stolen by a third party who "while in flight ran into the Plaintiff's vehicle." The defendant's conduct in *Ney* merely facilitated the theft of the vehicle. There was no initiation of a pursuit, nor any action on the part of the defendant that "caused" the flight that resulted in an accident. [To follow the rationale of the trial court adopted by the Seventh Circuit, leaving a cab unattended was foreseeable and, therefore could not be the proximate cause of the accident.] Yet the Illinois Supreme Court held that such conduct could constitute a proximate cause of the accident and, therefore, the evidence was sufficient to submit that issue of fact to the jury.

> The law of probable cause holds that an injury which is the natural and probable consequence of an act of negligence is actionable and such an act is the proximate cause of the injury.
>
> *Ney v. Yellow Cab Co.*, 2 Ill.2d 74, 80, 117 N.E.2d 74 (1954).

In holding that a jury must determine whether leaving a vehicle unattended was a proximate cause of the accident, the Illinois Supreme Court recognized that the *jury* expresses the state's common law on that issue.

> The common law has established itself in the history of jurisprudence because of its flexibility in its recognition of and adaptation to changing times and mores; and, as adopted by our legislature, "is a system of elementary rules and of general declarations of principles, which are continually expanding with the progress of society, adapting themselves to the gradual changes of trade, commerce, arts, inventions and the exigencies and usages of the country."

* * *

> Justice requires that we do more than honor and respect prior judicial decisions, for if only these two considerations were our guideposts then the path of jurisprudence would never change irrespective of a changing world. Cases similar in facts to the one at bar have reached the higher courts of this State, of Massachusetts, Minnesota, Indiana, Michigan, Louisiana, New York, New Jersey, and the District of Columbia, wherein experienced and learned lawyers and judges have differed on this question of probable cause. That reasonable minds can and have disagreed on this question cannot be denied. With these incontrovertible facts before us, we recall the reasoning of Justice Cardozo, that the range of reasonable apprehension is at times for the court, and at times, if varying inferences are possible, a question for the jury. The possibility of varying inferences in a case such as the one before us has been amply demonstrated. Certain facts may exist which a jury of reasonable men would consider as determinative in leading to a conclusion of liability or nonliability, all according to the circumstances of the particular case.
>
> *Ney v. Yellow Cab Co.*, 2 Ill.2d 74, 81, 82, 117 N.E.2d 74 (1954)

If the reckless operation of a stolen car by the thief in *Ney* could be a foreseeable consequence of thoughtlessly leaving a vehicle unattended, the intentional pursuit of a suspected thief which admittedly "causes" his reckless flight, must necessarily create a jury question on the issue of proximate cause. The *Ney* rationale of foreseeability has been repeatedly cited by the Illinois Supreme Court as the law applicable to the issue of proximate cause for the past thirty years. *Ray v. Cock Robin, Inc.*, 57 Ill.2d 19, 310 N.E.2d 9 (1974); *Scott and Fetzer Company v. Montgomery Ward and Company*, 112 Ill.2d 378, 393, 493 N.E.2d 1022, 1028 (1986).

The trial court's opinion failed to even mention *Ney*

and its progeny. Instead, the trial court cited opinions from the Sixth Circuit Court of Appeals and the District Court of West Virginia. (See trial court's opinion, *Armstrong v. Mudd*, 655 F.Supp. 853, 856-857 (C.D.Ill. 1987) There has been no applicable body of substantive federal common law in federal diversity cases since the *Erie* decision in 1938. Unless this Court abandons *Erie* it should not approve the redevelopment of such a body of law.

II.

THE ADOPTION OF THE TRIAL COURT'S OPINION, CONSTITUTES A VIOLATION OF THE PLAINTIFF'S RIGHT TO TRIAL BY JURY UNDER THE SEVENTH AMENDMENT.

> "In suits at common law...the right of trial by jury shall be preserved . . . " U.S. Constitution, Amendment VII.

Twenty years ago this Court reminded us that our founding fathers were reluctant to abandon jury trials and wanted constitutional protection against a single judge or group of judges usurping that function.

> Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.
>
> *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)

Our founding fathers were even more explicit in their reasons for including the right of civil trial by jury in our Bill of Rights. Patrick Henry argued strongly against adoption of the U.S. Constitution without an amendment guaranteeing the right of civil trial by jury.

> *Patrick Henry*:
>
> "Trial by jury is the best appendage of freedom . . .We are told that we are to part with

> that trial by jury with which our ancestors secured their lives and property . . . I hope we shall never be induced, by such arguments, to part with that excellent mode of trial."*

These arguments were answered in the *Federalist*, No. 83, assuring the states that a federal government would never abridge the right of civil jury trial.

> "The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there be any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government."*

Both Jefferson and Madison reaffirmed their strong convictions that the provisions of the Seventh Amendment guaranteeing civil trial jury would remain inviolate.

> *Thomas Jefferson*:
>
> "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." 3 *Writing of Thomas Jefferson* (Washington ed.) 71.*
>
> . . .
>
> *James Madison*
>
> "Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; . . . they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the Declaration of right."*

There was no question but that the federal judiciary was constitutionally precluded from removing genuine issues of fact from the province of a civil jury.

Justice Hugo Black championed the right of jury trial

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* All of the foregoing quotes are found in the dissent of Justice Black in *Galloway v. United States*, 319 U.S. 372, 396-411 (1942).

against judicial usurpation, and in the February 1956 issue of the Yale Law Journal in commemoration of his 70th birthday, Professor Leon Green traced briefly the history of civil jury trial and Mr. Justice Black's position. In a closing footnote, Professor Green noted:

> "Fortunately there are other devoted guardians of jury trial and of the integrity of trial courts to be found in the state and federal systems.
>
> . . .
>
> . . . But such judges are rare and they may well be the last great judges who intelligently fight the battle for the jury. For the power of organization, the volume and haste of the flow of business, and the mesh of doctrine are steadily and remorselessly taking jury trial (except for the formality) out of play as a mechanism for the protection of the individual's rights in civil matters."
>
> *The Yale Law Journal*, Volumn 64, February, 1956, Number 4, *Jury Trial and Mr. Justice Black*, by Leon Green, p. 494, footnote 35.

However, this Court has reaffirmed its position that civil jury trial is a federally protected constitutional right in diversity actions filed in federal courts.

> We agree with respondent that the right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions. The federal policy favoring jury trials is of historic and continuing strength. [Citation omitted.] Only through a holding that the jury trial right is to be determined according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment be achieved.
>
> *A.J. Simler v. Leslie E. Conner*, 372 U.S. 221 (1963)

The trial court cited two recent expressions of this Court, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), as if federal

district courts had been given additional discretion to summarily dispose of civil litigation. (See trial court's opinion *Armstrong v. Mudd*, 655 F.Supp. 853, 856-857.) However, this Court made clear that it did not intend to vest a judge with fact finding functions constitutionally reserved to a civil jury.

> Our prior decisions may not have uniformly recited the same language in describing genuine factual issues under Rule 56, but it is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.
>
> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)

The proper use of summary judgment has been repeatedly approved by this Court where no genuine issue of material fact exists, however, it has never authorized a *predetermination* of disputed facts.

> . . . But neither we nor the Court of Appeals can redetermine facts found by the jury *any more than the District Court can predetermine them.* For the Seventh Amendment says that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."
>
> . . .
>
> . . . As we recently stated in another diversity case, it is the Seventh Amendment that fashions "the federal policy favoring jury decision of disputed fact questions." *Byrd v. Blue Ridge Rural Elec. Cooperative*, 356 U.S. 525, 538, 539. And see *Herron v. Southern Pac. Co.*, 283 U.S. 91, 94-95.
>
> *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 359-360 (1962) (emphasis added)

Most federal circuits have adhered to this Court's

admonition regarding the preemptory use of summary judgment.** However, the Seventh Circuit refuses even superficial scrutiny of either the trial court's summary disposition of contested issues of fact or its refusal to recognize controlling precedent of the Illinois Supreme Court.

CONCLUSION

This decision is not compatible with Illinois law and, therefore, is at variance with this Court's doctrine expressed in *Erie*. Neither is the use of summary judgment consistent with the Seventh Amendment's guarantee of civil jury trial as it has been interpreted by this Court and the majority of federal circuit courts of appeal.

For the reasons stated herein, Petitioner prays that this Court issue a writ of certiorari to the Seventh Circuit Court of Appeals.

Respectfully submitted,

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** The First Circuit, *Briggs v. Kerrigan*, 431 F.2d 967 (1st Cir. 1970); the Second Circuit, *Shore v. Parklane Hosiery Co.*, 565 F.2d 815 (2d Cir. 1977); the Fifth Circuit, *Garcia v. Murphy Pacific Marine Salvaging Company*, 476 F.2d 303, (5th Cir. 1973); the Eighth Circuit, *Giordano v. Lee*, 434 F.2 1227 (8th Cir. 1970), *cert. den.* 403 U.S. 931 (1971); the Ninth Circuit, *Cox v. English-Am. Underwriters*, 245 F.2d 330 (9th Cir. 1957); the Tenth Circuit, *Machinery Center, Inc. v. Anchor Nat. Life Ins. Co.*, 434 F.2d 1 (10th Cir. 1970).

APPENDIX

U.S. Const. Amendment VII.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Ill.Rev.Stat., Ch.85, §4-102 Police protection

§4-102. Neither a local public entity nor a public employee is liable for failure to establish a police department or otherwise provide police protection service or, if police protection service is provided, for failure to provide adequate police protection or service, failure to prevent the commission of crimes, failure to detect or solve crimes, and failure to identify or apprehend criminals. This immunity is not waived by a contract for private security service, but cannot be transferred to any non-public entity or employee.

Laws 1965, p. 2983,§ 4-102, eff. Aug. 13, 1965. Amended by P.A. 84-1431, Art. 1, § 2, eff. Nov. 25, 1986.

Ill.Rev.Stat., Ch. 95½, §11-205 Public officers and employees to obey act–Exceptions

(a) The provisions of this Chapter applicable to the drivers of vehicles upon the highways shall apply to the drivers of all vehicles owned or operated by the United States, this State or any county, city, town, district or any other political subdivision of the State, except as provided in this Section and subject to such specific exceptions as set forth in this Chapter with reference to authorized emergency vehicles.

(b) The driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this Section, but subject to the conditions herein stated.

(c) The driver of an authorized emergency vehicle may:

1. Park or stand, irrespective of the provisions of this Chapter;

2. Proceed past a red or stop signal or stop sign, but only after slowing down as may be required and necessary for safe operation;

3. Exceed the maximum speed limits so long as he does not endanger life or property;

4. Disregard regulations governing direction of movement or turning in specifed directions.

(d) The exceptions herein granted to an authorized emergency vehicle, other than a police vehicle, shall apply only when the vehicle is making use of either an audible signal when in motion or visual signals meeting the requirements of Section 12-116 of this Act.

(e) The foregoing provisions do not relieve the driver of an authorized emergency vehicle from the duty of driving with due regard for the safety of all persons, nor do such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

(f) The provisions of this Chapter, with the exception of Articles IV and V of this Chapter,* do not apply to persons, teams, motor vehicles and other equipment while actually engaged in work upon the suface of the highway but apply to such persons and vehicles when traveling to or from such work.

P.A. 76-1586, § 11-205, eff. July 1, 1970. Amended by P.A. 76-1737, § 1; P.A. 76-1997, § 1, eff. July 1, 1970.

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* Chapter 95 ½, §§ 11-401 et seq., 11-501 et seq.

ILLINOIS PATTERN JURY INSTRUCTIONS (IPI 2d)

10.01 Negligence-Adult-Definition

When I use the word "negligence" in these instuctions, I mean the failure to do something which a reasonably careful person would do or the doing of something which a reasonably careful person would not do, under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.

60.01 Violation or Statute of Ordinance

There was in force in the [State of Illinois] [City of _____] at the time of the occurrence in question a certain [statute] [ordinance] which provided that:

> [Quote, or paraphrase, applicable part of statute or ordinance as constructed by the courts.]

If you decide that [a party] [the parties] violated the [statute] [ordinance] on the occasion in question, then you may consider that fact together with all the other facts and circumstances in evidence in determining whether or not [a party] [the parties] [was] [were] [contributorily] negligent before and at the time of the occurrence.

SPRINGFIELD POLICE DEPARTMENT

GENERAL ORDER #30 7-9-75 7-24-75

Date of Issue Effective Date

SUBJECT: High Speed Pursuits

DISTRIBUTION: Rescinds, Amends and Updates all other special instructions

ALL POLICE PERSONNEL

PLAINTIFF'S EXHIBIT 3

It is not expected that a person will be pursued to the point where the life of the officer or violator or other persons be placed in jeopardy. It shall be considered impracticable to continue a vehicle chase through areas of high traffic congestion, through school zones where children are going to and from schools, or in other areas where a speeding motor vehicle can obviously become involved in an accident.

The radio unit should be utilized to its fullest extent in informing other police vehicles of the chase and location, and if possible, the license number and identification of the auto, driver or passengers. Once an identification has been made, the pursuit should be discontinued with the prosecution eventually being concluded by means of a warrant of arrest.

Deadly force can result in the loss of life, therefore, the use of deadly force is to be avoided in all cases except forcible felonies (murder, rape, robbery, etc.). Suspicion alone is not sufficient enough for the use of deadly force. Just as a gun is considered deadly force, so is an automobile used to force another vehicle off the road. There will be no attempt to slow or stop a suspect vehicle by positioning the police unit directly in front of the suspect vehicle, nor will the bumping of the suspect vehicle in an effort to force him off the road be allowed.

Under *no* conditions is an unmarked police vehicle to become involved in a high speed pursuit. Barricading of a roadway by the use of a police vehicle will be used only as a last resort in felony cases and under no circumstances will the road be barricaded by occupied vehicles or the use of private vehicles. The police vehicle may be used as a barricade only if no other suitable equipment is available.

SANGAMON COUNTY SHERIFF'S DEPARTMENT - DEPARTMENT RULES AND REGULATIONS

Operating Vehicles Under Emergency Conditions

11.11 When responding to an emergency assignment, the officer will not operate his vehicle at a speed or in a manner that interferes with his complete control of it at all times. He will not proceed through intersections or traffic signals until he is sure that all other traffic has yielded the right-of-way. The basic rules of traffic safety will be adhered to at all times regardless of the nature of the assignment.

11.12 When operating an emergency vehicle in pursuit of a known or suspected offender, the officer will always weigh the risks involved against the nature of the offense which caused the pursuit. Pursuit will be terminated when, in the officer's best judgment, the risks of high-speed pursuit outweigh the desirability of apprehension. This is especially true when the only known offense is a traffic misdemeanor violation. Pursuit shall always be terminated when the officer's safety or the safety of others on the highway is in jeopardy.

ARMSTRONG v. MUDD

Cite as 655 F.Supp.853 (C.D.Ill. 1987)

APPENDIX A

Wanda Parker ARMSTRONG, as Special Administrator of the Estate of Patricia Weller, Deceased, Incompetent,
Plaintiff,

v.

Wayne MUDD, Officer Thomas Hendrickson, Sergeant Damon Barley, Sangamon County, Illinois, Officer John J. Greenan II, Officer Harland Sanders, Officer Scott Allin, and City of Springfield, Illinois,
Defendants.

United States District Court,
C.D.Illinois,
Springfield Division.

No. 85-3478.

Feb. 26, 1987.

Special administrator for driver's estate filed suit seeking recovery for the injury to and subsequent death of the driver as a result of a collision with the vehicle being driven by a fleeing criminal suspect. City and County police officers filed motions for summary judgment. The District Court, Mills, J., held that: (1) the applicable standard of care was reasonable care; (2) the city and county police officers used reasonable care in their pursuit of a theft suspect; and (3) even if the officers were initially negligent, that negligence was too remote to be considered a proximate cause of the accident.

Motions for summary judgment allowed.

1. Automobiles 187

City and county officers had duty to exercise reasonable care for safety of other persons when officers engaged in pursuit of suspected law violator. Ill.S.H.A. ch. 95 ½, ¶ 11-205.

2. Automobiles 244(1)

General guidelines referring only to use of due care in line of city and county officers' duty were insufficient to establish that officers breached their duty of reasonable care in pursuing criminal suspect. Ill.S.H.A. ch. 95 ½, ¶ 11-205.

3. Automobiles 244(1)

Fact that city and county patrolmen ran red lights, proceeded in wrong directio on one-way streets and surpassed speed limit did not establish that officers used less than reasonable care in pursuing criminal suspect. Ill.S.H.A. ch. 95 ½, ¶ 11-205.

4. Automobiles 187

It was not negligence per se for city and county officers to pursue criminal suspect through city streets on mere suspicion of simple theft. Ill.S.H.A. ch. 95 ½, ¶ 11-205.

5. Automobiles 201(1)

Direct and proximate cause of driver's death was utter disregard by criminal suspect of authority in running from police and his lack of due care in recklessly operating his vehicle, not any alleged breach of duty of due care on part of city and county officers.

6. Automobiles 201 (7)

Even if city and county patrolmen were initially negligent in pursuing criminal suspect, their negligence was too remote to be considered proximate cause of accident which

occurred when suspect's vehicle collided with driver's automobile after city officers had abandoned pursuit and after county officers had significantly reduced their speed and lost signt of suspect. Ill.S.H.A. ch. 95 1/2, ¶ 11-205.

Alexandra de Saint Phalle, Springfield, Ill., for plaintiff.

Frederick P. Velde, Robert E. Gillespie, Sue Myerscough, Springfield, Ill., Asher Geisler, Decatur, Ill., for defendants.

OPINION ORDER

MILLS, District Judge:

High speed chase.

The fleeing criminal suspect hits decedent's car.

Her administrator sues the police.

The police all move for summary judgment.

Motions allowed.

Plaintiff, special administrator for the estate of Patricia Weller, brings this lawsuit pursuant to the Illinois Wrongful Death, Ill. Rev.Stat. ch. 70, ¶ 1, and Survival Acts, Ill.Rev.Stat. ch. 110 1/2, ¶ 27-6.[1] She seeks recovery in sixteen counts for the injury to and subse-

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[1] The Wrongful Death Act reads in relevant part:

> Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation

(Footnote continued on the following page)

quent death of the deceased as a result of a 1982 vehicle collision with Defendant Wayne Mudd, a fleeing criminal suspect.[2] The complaint alleges negligence not only against Mudd, but also the pursuing patrolmen and their respective employers.[3]

Jurisdiction is premised upon diversity of citizenship, 28 U.S.C. § 1332(a)[4] , and Illinois substantive law governs. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

Now before the Court are the Defendant police officers' motions for summary judgment under Fed.R.Civ.P. 56. The underlying events appear not in dispute. Rather, the query

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1 *(continued)*

> which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person inured, and although the death shall have been caused under such circumstances as amount in law to felony.

Ill.Rev.Stat. ch. 70, ¶ 1.

Likewise, the survival statute states: "In addition to the actions which survive by the common law, the following also survive: . . . actions to recover damages for an injury to the person (except slander and libel), ..." Ill.Rev.Stat. ch. 110 1/2, ¶ 27-6.

[2] In the wrongful death counts, Plaintiff, on behalf of the deceased's two minor sons and herself as mother, seeks compensation in excess of $ 15,000 for the deprivation of love, affection, society, services, and earnings.

Similarly, she requests a like amount in the survival claims for decedent's loss of income and injury compensation during a three year period of incapacitation.

[3] The parties agree that the police officers were acting within the scope of their employment at the time of the occurrence.

[4] Complete diversity is present in this instance. All the Defendants reside in Illinois while the special administrator and estate beneficiaries are domiciled in either California or Washington. *See Wilsey v. Eddingfield*, 780 F.2d 614 (7th Cir.1985), *cert. denied*, ___ U.S. ___ , 106 S.Ct. 1660, 90 L.Ed.2d 202 (1986).

is whether such circumstances give rise to genuine issues of material fact regarding (1) the officers' alleged breach of the appropriate care standard, and (2) the proximate cause of the deceased's peril.

The Court finds that they do not. Summary judgment is proper.

Background

At approximately 6:00 a.m. on May 8, 1982, Springfield Police Officers John Greenan and Harland Sanders responded separately to a report of theft in progress at the OK Corral, a used car lot near the intersection of Taylor Avenue and Stevenson Drive in the southeast corner of the city. According to the complaint, both men observe the suspect, later identified as Wayne Mudd, enter a green Mercury Marquis and begin to flee. Siren and lights activated, Officer Greenan pursued Mudd north on Taylor, followed by Officer Sanders. Subsequently, the pursuit proceeded east on South Grand Avenue, southeast on Rochester Road, and south on Dirksen Parkway. Returning to Stevenson Drive, the accused then advanced west to Sixth Street, where he traveled north. (*See* Appendix.) During this period, both patrolmen were in constant communication with the city's dispatch officer. Greenan relayed the suspect's license number and requested assistance.

As a result, County Officer Thomas Hendrickson, accompanied in his squad car by Sergeant Damon Barley, received notice of the pursuit via the Illinois State Police Emergency Radio Network. Proceeding to the intersection of Sixth and Ash Streets, they joined in a roadblock with two city units.

Apparently spotting the barrier, Mudd turned west onto Cornell Avenue, one block south of Ash. Unable to make the corner, Officer Greenan progressed north to Ash where his attempted left turn resulted in the police car striking the curb. His vehicle inoperable, Greenan aban-

doned the chase.

In the meantime, Officer Sanders had advanced west onto Broad Place, one street prior to Cornell, hoping to cut off the fleeing suspect. He then heard over the radio that Mudd was northbound on Fourth Street. Having lost his quarry, Sanders shut off his siren and slowed down. He, too, abandoned the chase.

Officer Hendrickson and Sergeant Barley, however, continued the pursuit when Mudd averted the roadblock. Followed by city officer Scott Allin, the county car proceeded to Conell, becoming the lead unit behind the suspect. According to Allin, the chase endured at a speed of approximately 45 m.p.h.[5] Both cars activated their emergency equipment–flashing lights and sirens.

Within a few seconds, Mudd had gained over a one block lead on Officer Hendrickson. Officer Allin reported that when the county car reached Laurel Street, on which the suspect had proceeded west, both patrolmen had lost sight of the Mercury. Allin then terminated his emergency apparatus and withdrew from the hunt.

The uncontradicted police report filed by Officer Hendrickson and supported by his deposition describes the final seconds of Mudd's nine mile adventure:

> R/0 [Reporting Officer] turned onto Cornell just in time to see Mudd turn north on 4th St. R/O almost came to a dead stop at 5th St. due to parked vehi-

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[5] The Court notes that counsel for the city and its officers has done a less than desirable job of supplementing the record with the relevant facts. Thus, the events leading to the accident have been extracted in large part from the depositions of the county officer and Plaintiff's expert.

The Court reminds all litigants that motions for summary judgment are fact-based. Counsel should set forth the circumstances underlying the dispute in a memorandum, supported by the appropriate affidavits, despositions and documents. Only then can the Court apply the law.

> cles on 5th St. blocking R/O's view. R/O then proceeded across 5th St. to 4th St. As R/O turned north on 4th, R/O saw Mudd's vehicle already across Ash St. and still proceeding north at a high rate of speed on 4th St. R/O approached Ash and again came to almost a complete stop as two (2) autos were approaching side by side on Ash from the west. These two (2) vehicles stopped and R/O crossed Ash still northbound on 4th. R/O then saw the Mudd vehicle turn west on Laurel. Immediately Sgt. Barley reported, on County channel on (1) that the suspect vehicle was westbound on Laurel. R/O then said, "we've lost him, Damen". When the Mudd vehicle turned west on Laurel, R/O had just crossed Ash St. At that time R/O believed that the only chance of keeping track of the vehicle was if another officer was on Laurel and could see the Mudd vehicle. R/O proceeded to Laurel on 4th and looked west but did not see the Mudd vehicle on Laurel. R/O drove west on Laurel crossing the 3rd St. railroad tracks and saw the Mudd vehicle sitting in a gasoline station lot at Spring and Laurel Streets. R/O quickly proceeded to Spring and Laurel as Sgt. Barley radioed the message of a traffic accident involving the suspect vehicle.

Mudd had collided with an auto driven by Patricia Weller at the intersection of Spring and Laurel Streets.

The decedent was rendered incompetent for the duration of her life.

She died July 28, 1985.

Summary Judgment

Under Rule 56(c), summary judgment should enter "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no *genuine* issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". Fed.R.Civ.P. 56(c). Unquestionably, in determining whether a genuine issue of material fact exists,

the evidence is to be taken in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S.Ct. 1598, 1608-09, 26 L.Ed.2d 142 (1970). Nevertheless, the rule is also well established that the mere existence of *some* factual dispute will not frustrate an otherwise proper summary judgment. *Anderson v. Liberty Lobby, Inc.*, ___ U.S.___, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *Federal Deposit Ins. Corp. v. Meyer*, 781 F.2d 1260, 1267 (7th Cir.1986). Thus, the "preliminary question for the judge [is] not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." *Anderson*, 106 S.Ct. at 2511, *quoting Improvement Co. v. Munson*, 81 U.S. (14 Wall.) 442, 448, 20 L.Ed. 867 (1872); *see also Celotex Corp. v. Catrett*, ___ U.S. ___, 106 S.Ct. 2548, 2553, 91 L.Ed.2d In other words, the Court must consider the evidence "through the prism of the substantive evidentiary burden" in deciding Defendant's motion. *Anderson*, 106 S.Ct. at 2513; *Carson v. Allied News Co.*, 529 F.2d 206, 210 (7th Cir.1976). Applying this standard, the Court now turns to an analysis of the case at bar.

Discussion

In essence, Plaintiff maintains each officer involved in the chase was negligent in pursuing Mudd through the streets of Springfield on a mere suspicion of theft.[6] She claims the Defendants failed to exercise due care in disregarding proper police procedures, thereby jeopardizing the lives of innocent people. As a result of their actions, Plaintiff concludes the officers proximately caused the death of Patricia Weller.

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[6] Proof of negligence consists of evidence showing a duty to the injured party, a breach of that duty and an injury proximately resulting from the breach. *Neering v. Illinois Central R.R. Co.*, 383 Ill. 366, 382, 50 N.E.2d 497, 504 (1943).

With her conclusion, however, no reasonable jury could agree.

A. The Standard of Care

[1] The Administrator is correct in stating that police officers must exercise a degree of care for the safety of other persons when engaged in the pursuit of a suspected law violator. This principle has been established in Illinois at least since the decision in *Moore v. Cook*, 22 Ill.App.2d 48, 159 N.E.2d 496 (4th Dist.1959). *See also Sundin v. Hughes*, 107 Ill.App.2d 195, 246 N.E.2d 100 (1st Dist.1969). In fact, the Illinois General Assembly had codified the precept together with certain privileges applicable during a police chase at Ill.Rev.Stat. ch. 95 ½, ¶ 11-205:

> (b) The driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law . . . may exercise the privileges set forth in this Section, but subject to the condition herein stated.
>
> (c) The driver of an authorized emergency vehicle may:
>
> 1. Park or stand, irrespective of the provisions of this Chapter;
>
> 2. Proceed past a red or stop signal or stop sign, but only after slowing down as may be required and necessary for safe operation;
>
> 3. Exceed the maximum speed limits so long as he does not endanger life or property;
>
> 4. Disregard regulations governing direction of movement or turning in specified directions. . . .
>
> (e) The foregoing provisions do not relieve the driver of an authorized emergency vehicle from the duty of driving with due regard for the safety of all persons, nor do such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

See also Id. ¶ 11-907(b).

As indicated in subsection (e) of Paragraph 11-205, operators of emergency autos are generally required to abstain only from reckless or willful and wanton conduct. *See* Ill.Rev.Stat. ch. 85, 2-202. Nevertheless, where the public employer is insured for the misconduct of its employees, the issuing company waives the right to deny liability based upon any defense or immunity established by the legislature. *Id.* ¶ 9-103(c).

In this instance, Plaintiff alleges and Defendants admit that both Sangamon County and the City of Springfield are insured. Thus, reasonable care under the circumstances is the measure by which the police officers' actions must be judged. *Cf. Sundin*, 107 Ill.App.2d at 200-01, 246 N.E.2d at 104.

Having established the applicable standard, the next question becomes whether the Administrator presents a factual issue as to the Defendants' breach of duty.

B. Reasonable Care

The Court is well aware that the determination of a breach of duty is ordinarily a question of fact for the jury. *Jardine v. Rubloff*, 73 Ill.2d 31, 43, 21 Ill.Dec. 868, 873, 382 N.E.2d 232, 237 (1987). Still, a general principle is not a universal rule. If all of the evidence viewed in an aspect most favorable to the opponent so overwhelmingly favors the movant that no genuine issue of material fact exists, summary judgment is appropriate. *See Breck v. Cortez*, 141 Ill.App.3d 351, 95 Ill.Dec. 615, 490 N.E.2d 88 (2d Dist.1986).

As noted, the underlying facts are uncontradicted. The Plaintiff, however, maintains that a factual issue arises from the deposition of Ken Katsaris–an expert whose qualifications are too lengthy to mention. He believes the Defendants violated departmental policy in pursuing a suspect, accused only of theft, through an urban area. His

opinion is that high speed chases are seldom justified.

[2] Yet, neither the Adminstrator nor her expert have produced the regulations of the respective police departments, although the burden is upon them to do so.[7] Apparently, the relevant guidelines are quite general, referring only to the use of due care in the line of duty.[8] *Compare Breck*, 141 Ill.App.3d at 360-61, 95 Ill.Dec. at 621-22, 490 N.E.2d at 94-95. Coupled with the clear legislative policy reflected in Ill.Rev.Stat. ch. 95 ½ ¶ 11-205, recognizing the need for prompt apprehension of suspected law violators, and the privileges applicable to emergency vehicles,[9] such inexact rules cannot support the Plaintiff's position. No reasonable jury could so find.

[3] Indeed, Plaintiff accurately points out that the patrolmen ran red lights, proceeded the wrong direction down one-way streets, and surpassed the speed limit. But the Illinois General Assembly has deemed it proper for police officers to so act when in pusuit of a fleeing criminal so long as they exercise due regard for the safety of others. The events indicate the Defendants used nothing less than reasonable care under the circumstances. Officers

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[7] The burden unquestionably rests upon the Plaintiff to prove the Defendants' breach of duty by a preponderance of the evidence. *Hayes v. Alsburg*, 52 Ill.App.3d 355, 357, 10 Ill.Dec. 180, 182, 367 N.E.2d 568, 570 (4th Dist.1977). If her theory of recovery is based upon the violation of departmental policy, the Court cannot understand why she fails to provide the applicable guidelines unless they do not clearly support her position.

As the Supreme Court has noted: 'The plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial". *Celotex Corp. v. Catrett*, ___ U.S. ___, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986).

[8] *See* Katsaris deposition at 95-96.

[9] *See supra* subsection A.

Greenan, Sanders, and Allin of the city force all utilized their sirens and lights while engaged in the chase. The record simply does not support the inference that they unreasonably endangered the lives of innocent persons. Likewise, Deputy Hendrickson has stated without contradiction that after assuming the reins he lost Mudd when forced to reduce his speed on Fourth Street due to the presence of other motorists.

Furthermore, Sergeant Barley was merely riding in the county squad car at the time of the occurrence. Plaintiff fails to enlighten the Court as to her theory of recovery against him.

[4] Reduced to a minimum, Plaintiff claims that pursuing a criminal through city streets on the suspicion of simple theft is negligence *per se* where the police officer possesses a description of the culprit and the vehicle's license number. Such an assertion, however, is not–nor should it be–the law in Illinois. As one federal court has stated:

> We must not forget that primary duty was upon the pursued to stop .... It is hardly necessary to point out the overriding public policy of apprehending criminals as rapidly as possible, thus eliminating continued criminal acts, as a factor outweighing the undesirable consequences of holding an officer liable for the damages sustained by a third party ....
>
> We are not prepared to hold an officer liable for damages inflicted by the driver of a ... vehicle whom he was lawfully attempting to apprehend for the fortuitous reason only that the criminal drove through an urban area. To do so would open the door for every desperado to seek sanctuary in the congested confines of our municipalities, serene in the knowledge that an officer would not likely give chase for fear of being liable for the pursued's recklessness.

State v. Fidelity & Casualty Co., 263 F.Supp. 88, 90-91

(S.D.W.Va.1967). Undoubtedly, the officers' actions caused Mudd to drive recklessly. Still, the conclusion that the patrolmen are responsible for the result of the criminal's behavior does not follow. "Police cannot be made insurers of the conduct of the culprits they chase." *Bailey v. L.W. Edison Charitable Foundation*, 152 Ind.App. 460, 468, 284 N.E.2d 141, 146 (3d Dist.1972). The policy of safeguarding life and property by apprehending a fleeing suspect who, by electing to run, recklessly endangers innocent parties must be balanced against the possibility of injury upon commencing the pursuit. In other words, an officer's duty to drive with due care must be gauged in relation to the surrounding circumstances.

In this instance, the Court concludes as a matter of law that the Plaintiff failed to meet her substantive evidentiary burden with regard to the patrolmens' conduct.[10] Their duty was to suppress the offense and apprehend the offender. This they did by utilizing due care under the circumstances. A passage from a recent Illinois Appellate Court opinion is fitting:

> While it is most unfortunate that bystanders are sometimes innocently involved and injured by the police in the performance of their duties, such emotional and understandable human considerations are not substitute for proof of negligence. Such proof is lacking in the instant case.

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[10] Plaintiff cites *Brooks v. Lundeen*, 49 Ill.App.3d 1, 7 Ill.Dec. 262, 364 N.E.2d 423 (2d Dist.1977), as controlling. The Court, however, finds that case readily distinguishable. There, the officers directed an approaching motorist to park on the edge of the roadway so as not to interfere with a roadblock. Subsequently, the motorist was killed when the fleeing criminal ran head on into his car attempting to avoid the barrier. The city and its officers were held responsible. The breach of duty occurred when the patrolmen failed to direct the decedent from the roadblock area although they easily could have done so. Thus, unlike the instant case, the Defendants' actions directly placed the decedent in peril.

Breck, 141 Ill.App.3d at 361, 95 Ill.Dec. at 622, 490 N.E.2d at 95, *quoting Stanton v. State*, 26 N.Y.2d 990, 991, 311 N.Y.S.2d 28, 29, 259 N.E.2d 494, 495 (1970).[11]

Viewing the facts in a light most favorable to the Plaintiff, no reasonable jury could find that the officers breached their duty of due care. As a consequence, a discussion of proximate cause seems unnecessary. Nevertheless, since the issue provides an additional basis for the grant of summary judgment in this controversy, the Court will comment upon it briefly.

C. Proximate Cause

Like the breach of duty, the question of proximate cause is generally also for the jury. *Felty v. New Berlin Transit*, 71 Ill.2d 126, 130, 15 Ill.Dec. 768, 770, 374 N.E.2d 203, 205 (1978). But where the facts are undisputed and reasonable men could not differ as to the inferences to be drawn therefrom, the issue may be decided as a matter of law. *Id.* at 130, 15 Ill.Dec. at 769, 374 N.E.2d at 204. This is such a case.

Applying a simplified "but for" test, Plaintiff maintains the officers' conduct was a concurrent proximate cause of the deceased's injuries and subsequent death. In other words, if the police hadn't chased the fleeing suspect, the collision would not have occurred. The Adminstrator's analysis, however, is unconvincing. Rather, this Court is persuaded by the recent Illinois decision in *Huddleston v.*

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[11] In *Breck*, the Court applied the willful and wanton standard of Ill.Rev.Stat. ch. 85, ¶ 2-202 Apparently, the defendant municipalities had not procurred insurance and hence the immunity and defense waiver of ¶ 9-103(c) was inapplicable.

Nevertheless, the Court cited *Stanton* with approval. In that case, the New York Court of Appeals affirmed the dismissal of the administrator's wrongful death claim against the state despite uncontradicted expert testimony that the officer had usurped accepted police procedures *Stanton*, 311 N.Y.S.2d at 29, 259 N.E.2d at 497 (Burke, J., dissenting).

City of Charleston, 144 Ill.App.3d 1077, 99 Ill.Dec. 17, 495 N.E.2d 82 (4th Dist.1986).

In that case, the decedent, a motorcycle passenger of the fleeing culprit, was killed when the driver lost control attempting to avoid a police roadblock. Finding no evidence supporting proximate cause, the trial judge directed verdicts for the patrolmen and municipality. The appellate court affirmed, noting that the defendants did not put plaintiff's decedent at peril:

> [The criminal's] reckless disregard for his own safety, the safety of his passenger, the safety of other drivers, his disregard for the various licensing rules, and his engaging in a high speed police chase, evidences such negligence that it is clear that his actions were the original wrong . . . .
>
> The officers' conduct was reasonably foreseeable. As such, their conduct could not be the proximate cause of the accident.

Id. at 1080-81, 99 Ill.Dec. at 19-20, 495 N.E.2d at 84-85; *see also Downs v. Camp*, 113 Ill.App.2d 221, 252 N.E.2d 46 (1st Dist.1969).

[5] The situation confronting this Court is similar. Clearly, the direct and proximate cause of Patricia Weller's death was the utter disregard by Mudd of authority in running from the police and his lack of due care in recklessly operating his vehicle. "The officers would have been derelict in their duty had they not pursued the escapee in the reasonable manner in which they did pursue him". *United States v. Hutchins*, 268 F.2d 69, 72 (6th Cir.1959).

[6] Moreover, the facts establish that at the time of the accident, all the city officers had abandoned pursuit. Likewise, the county officials had significantly reduced their speed and lost sight of Mudd. Thus, even assuming *arguendo* that the patrolmen were initially negligent, such neglect is too remote to be considered a proximate cause of the mishap. "Any danger created by [the officers] had

spent itself and there was no causal connection between it and what followed." *Schatz v. Cutler*, 395 F.Supp. 271, 275 (D.Vt.1975).

Ergo, for all the aforementioned reasons, the motions for summary judgment filed by the Defendant Police Officers and their respective employers are ALLOWED.

The issue of Defendant Wayne Mudd's negligence remains for trail.

IT IS SO ORDERED.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
Argued December 8, 1987
March 21, 1988

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

MARINE BANK OF SPRINGFIELD, as Special Administrator of the Estate of PATRICIA WELLER, Deceased,
Plaintiff-Appellant,

No. 87-1675 *vs.*

THOMAS HENDRICKSON, SANGAMON COUNTY, ILLINOIS, DAMON BARLEY, JOHN GREENAN, II, HARLAND SANDERS, SCOTT ALLIN, CITY OF SPRINGFIELD, ILLINOIS,
Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois

No. 85-3478

Richard J. Mills, Judge

ORDER

Plaintiff-appellant, Marine Bank of Springfield, as Special Administrator of the estate of Patricia Weller, appeals from the order of the district court granting the defendants' motions for summary judgment. The plaintiff's

complaint alleged that the defendants' negligence caused Patricia Weller's death. Judge Mills' opinion order fully and correctly disposed of the appellant's claims; accordingly, on appeal we adopt the district court's order as our own opinion.

AFFIRMED

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
Argued December 8, 1987
April 18, 1988

APR 1988
LAW OFFICES
1227 S. 7th

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

MARINE BANK OF SPRINGFIELD, as Special Administrator of the Estate of PATRICIA WELLER, Deceased,
Plaintiff-Appellant,

No. 87-1675 *vs.*

THOMAS HENDRICKSON, SANGAMON COUNTY, ILLINOIS, DAMON BARLEY, JOHN GREENAN, II, HARLAND SANDERS, SCOTT ALLIN, CITY OF SPRINGFIELD, ILLINOIS,
Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois

No. 85-3478

Richard J. Mills, Judge

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled

cause by plaintiff-appellent, no judge* in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing, Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Harlington Wood, Jr. did not participate in the consideration of petition for rehearing *en banc*.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
May 6, 1988

Before

Hon. JOHN L. COFFEY, Circuit Judge

Hon. _____

Hon. _____

MARINE BANK OF SPRINGFIELD, as Special Administrator of the Estate of PATRICIA WELLER, Deceased,
Plaintiff-Appellant,

No. 87-1675 *vs.*

THOMAS HENDRICKSON, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois, Springfield Division.

No. 85-C-3478

Richard J. Mills, Judge

This matter comes before the court for its consideration upon the "MOTION TO STAY MANDATE" filed herein on April 22, 1988, by counsel for the plaintiff-appellant. On consideration thereof,

IT IS ORDERED that the above motion is GRANTED and the mandate in this appeal will be stayed pending the application to the Supreme Court for a writ of certiorari until and including June 6, 1988. If during this period, there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for a writ in that court, the stay will continue until final disposition by the Supreme Court.